Brigham Young University Law School
**BYU Law Digital Commons**

Utah Court of Appeals Briefs

2000

# State of Utah v. Brian William Drake : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

Part of the Law Commons

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
J. Frederic Voros, Jr.; Assistant Attorney General; Mark Shurtleff; Attorney Aeneral; Attorneys for Appellee.
Stephanie Ames; Gustin, Chritian, Skordas, and Caston, LLC; Attorney for Appellant.

## Recommended Citation

Brief of Appellant, *Utah v. Drake*, No. 20000298 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2720

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

| | | |
|---|---|---|
| THE STATE OF UTAH, | : | |
| | : | |
| Plaintiff/Appellee | : | CASE NO. 20000298-CA |
| | : | |
| v. | : | PRIORITY NO. 2 |
| | : | |
| BRIAN WILLIAM DRAKE | : | |
| | : | |
| Defendant/Appellant. | : | |

---

# APPELLANT'S BRIEF

Appeal from a judgment of conviction of forgery, in violation of Utah Code Annotated § 76-6-501 (1999), and of theft by deception, in violation of Utah Code Annotated § 76-6-405 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis presiding.

Stephanie Ames (#6466)
**GUSTIN, CHRISTIAN, SKORDAS,**
**& CASTON, L.L.C.**
Suite 810 Boston Building
9 Exchange Place
Salt Lake City, UT 84111
Attorney for Appellant

J. Frederic Voros, Jr. (#3340)
ASSISTANT ATTORNEY GENERAL
Mark Shurtleff (#4666)
**UTAH ATTORNEY GENERAL**
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorneys for Appellee

FILED
Utah Court of Appeals
FEB 27 2001
Paulette Stagg
Clerk of the Court

---

IN THE UTAH COURT OF APPEALS

---

| | | |
|---|---|---|
| THE STATE OF UTAH, | : | |
| | : | |
| Plaintiff/Appellee | : | CASE NO. 20000298-CA |
| | : | |
| v. | : | PRIORITY NO. 2 |
| | : | |
| BRIAN WILLIAM DRAKE | : | |
| | : | |
| Defendant/Appellant. | : | |

---

## APPELLANT'S BRIEF

Appeal from a judgment of conviction of forgery, in violation of Utah Code Annotated § 76-6-501 (1999), and of theft by deception, in violation of Utah Code Annotated § 76-6-405 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis presiding.

Stephanie Ames (#6466)
**GUSTIN, CHRISTIAN, SKORDAS,**
**& CASTON, L.L.C.**
Suite 810 Boston Building
9 Exchange Place
Salt Lake City, UT 84111
Attorney for Appellant

J. Frederic Voros, Jr. (#3340)
ASSISTANT ATTORNEY GENERAL
Mark Shurtleff (#4666)
**UTAH ATTORNEY GENERAL**
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorneys for Appellee

# TABLE OF CONTENTS

ARGUMENT

ADDENDUM

| | |
|---|---|
| Addendum A: | Sentence, Judgment, Commitment |
| Addendum B: | Jury Instruction No. 1 |
| Addendum C: | Jury Instruction No. 3 |
| Addendum D: | Jury Instruction No. 19 |
| Addendum E: | Jury Instruction No. 21 |
| Addendum F: | Jury Instruction No. 25 |
| Addendum G: | Utah Code Ann. § 76-2-202 (1999) |
| Addendum H: | Utah Code Ann. § 76-6-501 (1999) |
| Addendum I: | Utah Code Ann. § 76-6-405 (1999) |
| Addendum J: | Utah Const. art. I. § 7 |
| Addendum K: | U.S. Const. amend. V |
| Addendum L: | U.S. Const. amend XIV |
| Addendum M: | Affidavit of Brian William Drake |
| Exhibit 1: | Check dated March 27, 1998 |
| Exhibit 3: | Catherine Tousely, Account Leger |

# TABLE OF AUTHORITIES

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

---

IN THE UTAH COURT OF APPEALS

---

| | |
|---|---|
| THE STATE OF UTAH, | |
| Plaintiff/Appellee | CASE NO. 20000298-CA |
| v. | PRIORITY NO. 2 |
| BRIAN WILLIAM DRAKE | |
| Defendant/Appellant. | |

---

## JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(e) (1996), which authorizes this Court to review appeals from criminal convictions not involving a first degree or capital felony. A jury convicted the Appellant, Brian William Drake of forgery, in violation of Utah Code Annotated § 76-6-501 (1999), and of theft by deception, in violation of Utah Code Annotated § 76-6-405 (1999). Both crimes are third degree felonies. A copy of the judgment is attached as Addendum A.

## ISSUES, STANDARDS OF REVIEW, AND PRESERVATION

Issue 1: Did the trial judge err in failing to properly instruct the jury regarding the elements of the crimes? The trial court commits reversible error as a matter of law if it fails to instruct the jury on all elements of a crime. State v. Jones, 823 P.2d 1059, 1061 (Utah 1991). The trial judge below failed to instruct the jury that to convict Mr. Drake as an accomplice to the crimes charges, it must find that he solicited, requested, encouraged, commanded, or intentionally aided the principal actor in committing the crime.

Standard of Review and Preservation: This issue was not raised below. When jury instructions are not objected to in the trial court, this court will review the claimed error to avoid manifest injustice. Utah R. Crim. Pro. 19(c). Manifest injustice, requiring reversal as a matter of law, occurs when the trial judge fails to accurately instruct the jury on all of the elements of a crime. State v. Gibson, 908 P.2d 352, 354-55 (Utah Ct. App. 1995).

Issue 2: Did Mr. Drake receive ineffective assistance of counsel due to trial counsel's failure to object to the faulty jury instructions that did not fully instruct the jury on the elements of the charged offenses and trial counsel's failure to obtain witnesses that could testify on Mr. Drake's behalf.

Preservation/Standard of Review: This issue was not raised below. In reviewing an ineffective assistance of counsel claim, the Court must find that (1) counsel made errors so serious that the defendant was deprived of his Sixth Amendment guarantee to counsel and (2) that the performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674 (1984).

Issue 3: Did the State's primary witness's contradictory statements and false testimony establish sufficient evidence to prove Mr. Drake's guilt. The State's primary witness, who offered the only evidence connecting Mr. Drake to the crimes, offered several conflicting stories, testified falsely at the preliminary hearing and at trial, and first revealed the vital details of the crimes at trial. This Court must reverse a conviction for insufficient evidence if the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt as to the defendant's guilt or innocense of the charges.

Standard of Review: In reviewing a conviction for sufficient evidence, this Court, while viewing the evidence in a light most favorable to the State, determines whether "the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." State v. Giles, 966 P.2d 872, 876 (Utah Ct. App. 1998) (internal quotations and citations omitted).

Preservation: This issue was preserved for appeal when counsel moved the Court to dismiss the charges against Mr. Drake based on insufficiency of the evidence and the State's failure to make out a prima facie case. R. 150: 119.

## RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The text of the following statutes and constitutional provisions are contained in the Addenda:

| | |
|---|---|
| Addendum G: | Utah Code Ann. § 76-2-202 (1999). |
| Addendum H: | Utah Code Ann. § 76-6-501 (1999). |
| Addendum I: | Utah Code Ann. § 76-6-405 (1999). |
| Addendum J: | Utah Const. art. I, § 7. |

## STATEMENT OF THE CASE

In an information filed on February 5, 1999, the State charged Mr. Drake with one count each of forgery and theft by deception. R.6. The trial court conducted a jury trial on November 15, 1999. R.150.[1] The jury convicted Mr. Drake of both charges. R. 150: 159-60. The trial judge sentenced Mr. Drake on March 3, 2000. R. 150: 169. Mr. Drake filed a timely notice of appeal the same day. R. 135. On December 21, 2000, Mr. Drake filed a Motion to Remand for Findings Necessary to Determination of Ineffective Assistance of Counsel. This motion was denied in an order dated January 18, 2001.

## STATEMENT OF THE FACTS

From 1990 to 1997, Patricia Westlake lived in an apartment located at 149 South and 700 East in Salt Lake City. R. 150:107. During this period, Ms. Westlake had an account with Providian National Bank of Tilton, New Hampshire. R.150: 108. Some time prior to April of 1998, Ms. Westlake closed the account, but Providian continued to mail her cash advance checks for $3,000 to entice her to reopen her account. R. 150: 109. Ms. Westlake's mail was delivered to her residence through a slot in her apartment door. R. 150: 108. The checks invited Ms. Westklake to reestablish her relationship with Providian by signing the checks and depositing them into her financial institution. R. 150: 109. Ms. Westlake declined each of Providian's solicitation. R. 150: 109.

---

[1] The volume marked "150" contains both the trial and sentencing transcripts. The internl page numbers of that volume are listed after "R.150."

In August of 1997, Ms. Westlake moved out of her apartment into a new residence. R. 150: 107. At some unspecified time, Mr. Drake moved into the apartment. Ms. Westlake and Mr. Drake did not know each other. R. 150: 112. The parties stipulated below that Mr. Drake was living in the apartment from April 12, 1998 to May 1, 1998. R. 150: 112-13. There is no evidence of who lived at the residence between Ms. Westlake's departure in August of 1997 and April 28, 1998.

On April 28, 1998, an acquaintance of Mr. Drake, Catherine Tousley, used an ATM at the America First Credit Union in the Brickyard Plaza to deposit into her account one of the $3,000 checks addressed to Ms. Westlake from Providian. R. 150: 70-71; Exhibits 1, 3. The check was dated March 27, 1998 and purportedly had been signed over to Ms. Tousley by Ms. Westlake. R. 150: 94; Exhibit 1. The following day, Ms. Tousley went to a different America First location and withdrew $2,500 from her account. R. 150: 72; Exhibit 3.

The next day, April 30, 1998, Ms. Tousley deposited another $3,000 check from Providian to Ms. Westlake in a different America First ATM. R. 150: 93-94. That check was identical to the first but was dated April 27, 1998. Exhibit 2. Like the first check, Ms. Westlake had purportedly signed it over to Ms. Tousley. R. 150: 93-94.

The bank teller who processed the check became suspicious because cash advance checks are rarely signed over to other people. R. 150: 94. Since Ms. Westlake also had an account at America First, the teller compared Ms. Westlake's signature on other financial documents on file within the bank with the signature on the back of the check and determined that the signature had been forged. R.150: 94-95. The teller then placed a hold on the check and alerted Ms. Westlake to the forgeries. R. 150: 95-96.

Following these incidents, America First's director of security telephones Ms. Tousley to inquire about the forgeries. R. 150:98, 103. Ms. Tousley falsely stated that she had lent her ATM card and personal identification number to some unspecified friends and she did not know what they had done with the card. R. 150: 104-05. Following this conversation, the security director left several telephone messages for Ms. Tousley but Ms. Tousley failed to return the calls. R. 150: 105.

A police detective met with Ms. Tousley at the police station on January 8, 1999. R. 150: 115. After receiving Miranda warnings, Ms. Tousley admitted to forging and depositing the first $3,000 check. R. 150: 116-17. According to her, after she deposited the check, Mr. Drake and Mr. Drake's friend drove her to America First. R. 150: 116-17. Ms. Tousley represented that she had worked with Mr. Drake at a Taco Bell restaurant. R. 150: 116. She then falsely claimed that she withdrew the entire $3,000 in two separate transactions and gave it all to Mr. Drake. R. 150: 117. Bank records showed that she withdrew only $2,500 in one transaction. Exhibit 3.[2]

---

[2] Although Ms. Tousley made three withdrawals following the deposit of the first $3,000 check, only one appears to correspond to the forged check. Exhibit 3 shows that Ms. Tousley deposited $3,000 on April 28, 1998 and then withdrew $2,500 the following day. The next day, April 30, 1998, she withdrew $301.50 and then deposited the other $3,000 check. Later that day, she withdrew another $110.00.

Following this interview, the police arrested Mr. Drake and charged him with forgery and theft by deception for the deposit and withdrawal of the first check only. R. 5, 6. At a preliminary hearing, Ms. Tousley reiterated her false claim that she withdrew the entire $3,000 in one transaction and had given it all to Mr. Drake. R. 150: 87. She contended further that she had printed on the back of the first check, "payed [sic] to the order of Cathi Tousley" and then endorsed the check. R. 150: 81-82. Some unknown person had forged Ms. Westlake's signature. Based on Ms. Tousley's claims, the trial court bound over Mr. Drake on both charges. R. 19.

Approximately a month before trial, the police interviewed Ms. Tousley again to clarify her story. R. 150: 66, 117-18. For the first time, Ms. Tousley admitted that she had withdrawn only $2,500 from her account and had kept $500 as payment for depositing the first check.

At trial, Ms. Tousley served as the State's primary witness against Mr. Drake. She acknowledged giving false information to the police and to perjuring herself at the preliminary hearing. R. 150: 66. Despite her previous lies, Ms. Tousley claimed that she would testify truthfully at trial. R. 150: 66.

Contrary to her statement to the police, Ms. Tousley testified that she had never seen Mr. Drake at Taco Bell and she did not remember ever meeting him there. R. 150: 67-68. In fact, she maintained that she had never told the police that she had worked with Mr. Drake. R. 160: 85. Instead, she indicated that she simply informed the police that she had known Mr. Drake for a year and she considered him a friend. R. 150: 86.

Ms. Tousley claimed that on April 28, 1998, Mr. Drake approached her and asked her to deposit the first $3,000 check into her account because he did not have a bank account in Utah and because Ms. Westlake owed him money. R. 150: 68-70. In exchange for Ms. Tousely's services, Mr. Drake offered to let her keep $500. R. 150: 70.

Contrary to her preliminary hearing testimony, Ms. Tousley testified that when she received the check someone had already printed on it "payed [sic] to the order of" and she had signed Ms. Westlake's signature. R. 150: 70-71, 79. A casual inspection of the check indicates that the phrase "payed [sic] to the order of Cathi Tousley" appeared to be printed in the same handwriting. Exhibit 1. Nevertheless, Ms. Tousley claimed to have printed only her name on the check. R. 150: 70-71. She the endorsed the check below Ms. Westlake's signature. R. 150: 70-71; Exhibit 1. Ms. Tousely's endorsement appears to be substantially different from the handwriting of her name. Exhibit 1.

The next day, April 29, 1998, Ms. Tousley went to the downtown branch of America First to withdraw the money. R. 150: 72. In conflict with her initial statement to the police that Mr. Drake and a friend drove her to the bank, Ms. Tousley asserted at trial that she met Mr. Drake there. R. 150: 72 She also denied ever telling the police that Mr. Drake had driven her to the bank. R. 150: 88. At the bank, she withdrew $2,500 and gave it to Mr. Drake. R. 150: 72.

Ms. Tousley testified that later that same day, Mr. Drake gave her the second

$3,000 check to deposit because Ms. Westlake still owed him money. R. 150: 72-74. Ms. Tousley asserted that she printed and signed her name on the check and deposited it into an ATM that day. R. 150: 74. Contrary to this testimony, the bank records establish that Ms. Tousley deposited the check on April 30, not April 29. Exhibit 3.

On May 1, 1998, Ms. Tousley telephoned America First and learned that a hold had been placed on the second check. R. 150: 74. Mr. Drake came to Ms. Tousley's house later that day and she explained the situation to him. R. 150: 74-75. Ms. Tousley alleged for the first time that Mr. Drake became angry upon hearing this news and threatened to hurt her. R. 150: 75, 87-88. She alleged further that Mr. Drake later left messages on her answering machine.

Following the presentation of evidence, th trial judge reiterated the charges contained in the Information. R. 150: 123. Instruction number one explained that for forger the State had to prove that Mr. Drake, as "a party to the offense, did alter, make, complete, execute, authenticate, issue, transfer, publish, or utter any writing . . . purport[ing] to be the act of another, with a purpose to defraud." R. 86; Addendum B. As for theft by deception, the Information claimed that Mr. Drake, as "a party to the offense, obtained or exercised control over the property of America First Credit Union by deception, with the purpose to deprive the owner thereof . . . ." R. 86; Addendum B.

Instruction number three required the State to prove "each of the essential allegations contained in the Information . . . beyond a reasonable doubt." R. 87;

Addendum C. In determining whether the State met this burden, the judge emphasized that the jury was to base its decision only in the evidence presented at trial and the law as stated in the jury instructions. R. 150: 88.

Instruction number 19 defined the term "party" as any person, "acting with the mental state required for the commission of the offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense. . . ." R. 103; Addendum D.

The trial judge then listed for the jury the required elements to convict Mr. Drake of forgery:

> 1. That on or about the 28th day of April, 1998, in Salt Lake County, State of Utah, the defendant, BRIAN WILLIAM DRAKE, intentionally or knowingly made, executed, issued or uttered a writing; and
> 2. That said writing or utterance purported to be the act of Patrica R. Westlake; and
> 3. That said writing or utterance was not the act of Patricia R. Westlake; and
> 4. That said writing or utterance was not authorized by Patrica R. Westlake; and
> 5. That the said defendant then and there knew the writing was not the act of Patricia R. Westlake and was not authorized by Patricia R. Westlake; and
> 6. That the said defendant then and there had a purpose to defraud.

R. 105; Addendum E.

The trial judge similarly listed the required elements for the crime of theft by deception:

> 1. That on or about the 28th day of April, 1998, in Salt Lake County, State of Utah, the defendant, BRIAN WILLIAM DRAKE, intentionally or

> knowingly obtained or exercised unauthorized control over the property of America First Credit Union; and
>
> 2. That the defendant obtained or exercised control over such property by deception; and
>
> 3. That the defendant obtained or exercised control over such property with a purpose to deprive the owner thereof; and
>
> 4. That the value of the property was or exceeded $1,000.00 but was less than $5,000.00.

R. 110; Addendum F.

Immediately following the reading of the jury instructions, the Court conversed with counsel as follows:

> THE COURT: Counsel, do you both stipulate that I read the instructions substantially as written?
>
> MR. UPDEGROVE (Prosecutor): We do, Your Honor.
>
> MR. HALL: We do.
>
> THE COURT: You both waive any objections, if there are any?
>
> MR. UPDEGROVE: We do, Your Honor.
>
> THE COURT: Thank you. All right.

R. 150: 123. Mr. Drake's trial counsel waived any objection to the jury instructions as read and provided to the jury.

During closing arguments, the prosecutor articulated his theory that Mr. Drake was a party to the offenses as an accomplice. R. 150: 130-31. He argued that Mr. Drake prompted Ms. Tousley to actually commit the crimes. R. 150: 125-26. Defense counsel countered that Ms. Tousley lacked credibility and could not be believed. R. 150: 144-45.

He urged the jury to reject Ms. Tousley's story given her repeated lies, claims raised for the first time at trial, and obvious motive to exonerate herself. R. 150: 146-47.

The jury, nevertheless, convicted Mr. Drake of both charges,. R. 150: 159-60. The trial judge sentenced Mr. Drake to consecutive terms of up to five years in prison but suspended the sentences in lieu of three years probation. R. 150: 176; Addendum A. The judge also ordered Mr. Drake to pay a $500 fine and $2,917.05 in restitution. R. 150: 177; Addendum A. This appeal followed. R. 135.

## SUMMARY OF THE ARGUMENT

The trial judge failed to adequately instruct the jury on th elements of the offenses. Because the State tried Mr. Drake under an accomplice theory, it had to prove beyond a reasonable doubt that Mr. Drake aided and abetted Ms. Tousley in committing the crimes. The trial judge never required the jury, as a prerequisite to convicting Mr. Drake, to dins the aiding and abetting element. Even viewing the instructions as a whole, not reasonable juror could have understood that aiding and abetting was a required element of the offense. This omission deprived Mr. Drake of his constitutional rights to due process, a unanimous jury verdict, and a jury trial.

Although Mr. Drake did not raise this issue in the trial court, the failure to instruct the jury on the elements of the offenses constitutes a manifest injustice which defendants can raise initially on appeal. Moreover, this failure requires reversal as a matter of law. Although on the surface some cases arguably disagree with this conclusion, they do not apply to the failure to instruct the jury on the elements and they are readily distinguishable from this case.

Reversal is required even under harmless error analysis because the evidence is controverted concerning Mr. Drake's guilt. Specifically, Ms. Tousley's repeated lies and the lack of independent evidence connecting Mr. Drake to the offenses bar the State from showing the failure to properly instruct the jury was harmless beyond a reasonable doubt.

In any event, the State presented insufficient evidence to convict Mr. Drake. Ms. Tousley provided the only testimony or evidence connecting Mr. Drake to the forgery and theft. Ms. Tousley repeatedly lied to the bank security officer and to the police. She then perjured herself at the preliminary hearing and at trial. Ms. Tousley completely lacked credibility and her testimony had no probative value.

The only other evidence that remotely linked Mr. Drake to the crimes was evidence that he lived at the same apartment where the first check was mailed a month <u>after</u> the mailing. The State presented no evidence showing who lived at the address at the time of the mailing, who had access to the apartment, or any other information to connect Mr. Drake to the check. This gap in the evidence prevented the State from establishing Mr. Drake's guilt.

# ARGUMENT

## I. REVERSIBLE ERROR OCCURRED WHERE THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT IT MUST FIND BEYOND A REASONABLE DOUBT THAT MR. DRAKE AIDED AND ABETTED MS. TOUSLEY, AND INSTEAD ERRONEOUSLY INFORMED THE JURY THAT TO CONVICT MR. DRAKE, IT MUST FIND THAT HE WAS THE PRINCIPAL ACTOR.

Although the State tried Mr. Drake under an accomplice theory, the elements instructions for forgery and theft by deception failed to require the jury to find beyond a reasonable doubt that Mr. Drake aided or abetted Ms. Tousley in committing the forgeries. Because the instructions, whether viewed separately or as a whole, failed to require the jury to find an essential element to the crimes, reversal is required as a matter of law. Reversal is required, even applying harmless error analysis, given Ms. Tousley's complete lack of credibility and the absence of any evidence linking Mr. Drake to the crimes.

### A. The Trial Court Erred In Failing To Instruct the Jury That To Convict Mr. Drake It Must Find That Beyond a Reasonable Doubt He Aided and Abetted Ms. Tousley.

The State theorized below that Mr. Drake did not directly commit the crimes, but rather that he convinced Ms. Tousley to deposit the check then withdraw the money from her account. R. 150:126-26. The State presented no evidence that Mr. Drake personally forged or deposited the check or withdrew the money. Thus, the evidence cannot support the convictions under a principal theory. Rather, to convict Mr. Drake, Utah Code

Annotated § 76-2-202 (1999) required the jury to find that he (1) "act[ed] with the mental state required for the commission of [the charged] offense[s];" and, (2) "solicit[ed], request[ed], command[ed], encourage[d], or intentionally aid[ed]" Ms. Tousley in committing the crimes.

State and federal due process as well as the Utah Criminal Code require the State to prove all elements of a crime beyond a reasonable doubt. State v. Lopes, 1999 UT 24 ¶¶ 13, 14, 980 P.2d 191 (citing Utah Const. art. I, § 7; U.S. Const. amend. V, XIV; State v. Herrera, 895 P.2d 359, 368 (Utah 1995) ("due process mandates that the prosecution prove every element of the charged crimes beyond a reasonable doubt"); State v. Swenson, 838 P.2d 1136, 1138 (Utah 1992) (holding that State has burden of proving all elements of a crime); State v. Starks, 627 P.2d 88, 92 (Utah 1981) ("A fundamental precept of our criminal law is that the state must prove all elements of a crime beyond a reasonable doubt"); Utah Code Ann. § 76-1-501 (1995) (requiring that each element of the offense charged be proved beyond a reasonable doubt, including "[t]he conduct, attendant circumstances, and [t]he culpable mental state required")).

This right, in turn, requires trial judges to instruct the jury "what each element is and that each must be proved beyond a reasonable doubt . . . ." State v. Laine, 618 P.2d 33, 35 (Utah 1980). While all of the elements need not appear in a single instruction, reversible error occurs where the instructions fail to communicate to the jury "the basic elements of the crime." State v. Harmon, 712 P.2d 291, 292 (Utah 1986).

In listing the required elements for convicting Mr. Drake of forgery and theft by deception, the trial judge failed to instruct the jury that to convict Mr. Drake as an accomplice it had to find beyond a reasonable doubt that he solicited, requested, commanded, encouraged, or intentionally aided Ms. Tousley in committing the crimes. While Instruction number 19 informed the jury that an individual could be convicted as a party for either directly committing an offense or for aiding and abetting another, it did not require the jury to find that Mr. Drake aided Ms. Tousley in committing the crimes. See R. 103, 105-06, 110; Addenda D, E, F. Instead, the elements instructions for the crimes (numbers 21 and 25) required the jury to determine whether Mr. Drake was the principal actor.

Aiding and abetting is an essential element of a crime where the State is attempting to convict an individual under an accomplice theory rather than directly committing the crime. As the Utah Supreme Court ruled, the State "must prove all the elements of accomplice liability, including the mental state, beyond a reasonable doubt . . . ." Lopes, 1999 UT 24, ¶ 11; see also, State v. Scott, 732 P.2d 117, 120 (Utah 1987) (recognizing that the actus reus for aiding and abetting is soliciting, requesting, encouraging, or intentionally aiding in the substantive offense); State v. Pacheco, 492 P.2d 1347, 1348 (Utah 1972) ("Pacheco I"), affirmed on rehearing, State v. Pacheco, 495 P.2d 808, 808 (Utah 1972), ("Pacheco II") (indicating that aiding and abetting and direct responsibility are two distinct theories involving distinct elements). In Lopes, for example, although the

Court directly addressed the constitutional limitations on enhancing sentences for crimes in which more than two persons participate, it clarified that aiding and abetting is an element of a crime which must also be proved beyond a reasonable doubt. 1999 UT 24 ¶ 8-15.

The trial court's elements instructions "wholly fail[ed] to instruct the jury" on the aiding and abetting element. <u>Harmon</u>, 712 P.2d at 292; <u>see</u> R. 105, 110. Those instructions informed the jury that to convict Mr. Drake it "must find from all of the evidence and beyond a reasonable doubt <u>each and every one of the following elements</u> . . . ." R. 105, 110 (emphasis added); Addenda E, F. The instructions then specifically listed and numbered the required elements. Aiding and abetting was noticeably absent from both instructions. R. 105, 110; Addenda E, F. Thus, the instructions communicated to the jury that a conviction required the jury to find only the listed elements and none others.

Even viewing all of the instructions together, the trial judge never communicated to the jury that it had to find beyond a reasonable doubt that Mr. Drake aided and abetted Ms. Tousley. For the jury to understand that aiding and abetting was a distinct element of the offenses, the jury had to connect the accomplice liability instruction (number 19), the elements instructions (numbers 21 and 25) with the very first instruction which recited the charges in the Information. Specifically, Instruction number one which detailed the charges in the Information simply accused Mr. Drake of being "a party to the offense[s]."

R. 86. Nineteen instructions later, the trial judge defined the term "party" as either the principal actor or one who "solicit[ed], request[ed], command[ed], encourage[d], or intentionally aid[ed]" another who actually committed the crimes. R. 103; Addendum D. The trial judge neither defined those terms nor did she apply them to the facts of this case. She simply gave the jury the legal definition of a party.

Even assuming the jury could link these two distant instructions, it must have then ignored the directives in the elements instructions to determine whether Mr. Drake was a principal and to limit its fact finding only to determining whether the State had proved "each and every" one of the numbered elements. The jury must have then noticed that the elements instructions (numbers 21 and 25) also mentioned the "information." R. 105, 110; Addenda E, F. To finally connect all of the instructions, the jury must have inferred that because the Information charged Mr. Drake with being a "party" to the offenses, the instructions required it to find beyond a reasonable doubt the unmentioned element that Mr. Drake aided and abetted Ms. Tousley as defined in Instruction number 19.

No reasonable person, untrained in the law, is capable of performing such legal gymnastics. In the first place, "an information instruction is not a substitute for an elements instruction." Jones, 823 P.2d 1061. Second, the instruction ignored the Utah Supreme Court's warning not to instruct lay jurors using "arid, dense statutory language" without applying the law to the facts of the particular case. State v. Standiford, 769 P.2d 254, 266 (Utah 1988). Third, even the prosecutor conceded during oral arguments that he, after years of experience, had difficulty "comprehend[ing]" the jury instructions. R. 150:123. The obscurity of the instructions were certainly even more mystifying to lay jurors.

The Utah Supreme Court's decision in State v. Harmon, 712 P.2d 291 (Utah 1986), further supports requiring the trial judge to accurately instruct a jury that it must find beyond a reasonable doubt that a defendant aided or abetted another. In Harmon, the State requested a lesser included offense instruction for attempted robbery in a case where the defendant was charged with robbery. Id. at 291. The trial court granted that request and instructed the jury on attempt by "merely insert[ing] the word 'attempted' before the word 'robbery' in the previously prepared instruction on the elements of the robbery." Id. The defendant was convicted of attempted robbery and appealed her conviction. Id.

In Harmon, the Supreme Court reversed because the trial court failed to instruct the jury "that in order to convict of attempted robbery the jury must find, beyond a reasonable doubt, that defendant's conduct constituted a 'substantial step' toward commission of the offense and the substantial step must be 'strongly corroborative' of defendant's intent to commit the offense." Id. at 291-92. Just like the failure to define "attempt," the trial judge below never explained to the jury that it must find beyond a reasonable doubt that Mr. Drake "solicit[ed], request[ed], command[ed], encourage[d] or intentionally aided" another in committing the crimes.

The failure to instruct the jury deprived Mr. Drake of other constitutional rights. Because the instructions did not require the jury to determine whether Mr. Drake aided Ms. Tousley, Mr. Drake lost his right to a jury trial. Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 1835 (1999). The right to a jury trial specifically contemplates that jurors will decide each factual issue necessary to sustain a conviction:

> In criminal jury trials, questions of fact and the weight of the evidence are to be decided by the jury, absent waiver. See Utah Code Ann. § 77-17-10 (1995); State v. Green, 78 Utah 580, 589-90, 6 P.2d 177, 181 (1931) ("It is the sole and exclusive province of the jury to determine the facts in all criminal cases, whether the evidence offered is weak or strong, is in conflict or is not controverted.").

Lopes, 1999 UT 24 ¶ 16.

Moreover, Article I, section 10 of the Utah Constitution guarantees the right to a unanimous jury verdict. See State v. Saunders, 1999 UT 59, ¶¶ 60, 65, 992 P.2d 951 (requirements of Article I, section 10 would not be met if jury was not given an elements instruction). Where a jury is not instructed on an element of a crime, the Article I, section 10 unanimity requirement is not met. Id.

### B. The Court's Error In Failing to Properly Instruct the Jury Regarding the Element of Aiding and Abetting Requires a New Trial.

These violations of Mr. Drake's constitutional rights require reversal. Although Mr. Drake did not object to the erroneous elements instruction, this Court will review a claim that the jury was erroneously instructed to avoid manifest injustice. Utah R. Crim. Proc. 19(c); State v. Gibson, 908 P.2d 352, 354 (1995). Manifest injustice occurs where the trial judge fails to accurately instruct the jury on all of the elements of a crime. Jones, 823 P.2d at 1061 ("The complete absence of an elements instruction on a crime is an error we review to avoid manifest injustice"); American Fork v. Carr, 970 P.2d 717, 720 (Utah App. 1998) (failure to properly instruct on elements "satisfies manifest injustice standard under Rule 19(c)" and requires a new trial); State v. Lesley, 672 P.2d 79, 81 (Utah 1983) (defendant's conviction for trespass reversed to avoid manifest injustice where elements instruction misstated law of criminal trespass); Laine, 618 P.2d at 35 (reversible error occurs where trial judge fails to instruct jury on all elements of a crime). This omission "constitutes reversible error as a matter of law." Gibson, 908 P.2s at 354 (defendant's conviction reversed to avoid manifest injustice where jury was not instructed that lack of consent was an element of forcible sexual abuse).

Without explicitly conducting a traditional plain error review, this Court and the Utah Supreme Court have repeatedly held that the manifest injustice standard requires reversal where the trial judge fails to accurately instruct the jury on the elements of a crime. See e.g. Carr, 970 P.2d at 720 ("This court has consistently held that '[f]ailure to give an elements instruction for a crime satisfies the manifest injustice standard under Rule 19(c) and constitutes reversible error as a matter of law.'") (quoting Gibson, 908 P.2d at 354); Laine, 618 P.2d at 35 (failure to instruct on all elements of a crime is reversible error). While that precedent requires reversal in this case, a traditional plain error review likewise mandates reversal since the error in instructing the jury was "plain" or "manifest" and "of sufficient magnitude that it affects the substantial rights of [Appellant]." State v. Verde, 770 P.2d 116, 121-22 (Utah 1989) (indicating that "in most circumstances, the term 'manifest injustice' is synonymous with the 'plain error' standard" which requires that an error be "plain" or "manifest" and "of sufficient magnitude that it affects the substantial rights of a party").

The error in failing to instruct the jury on the element of aiding and abetting was plain and manifest under Utah Code Annotated § 76-2-202, Pacheco I, Pacheco II, Scott, and the recent Utah Supreme Court decision in Lopes. As outlined above, these cases and the statute establish that the State must prove beyond a reasonable doubt that the defendant solicited, requested, commanded, encouraged, or intentionally aided another. The error in failing to instruct the jury that it must find that element beyond a reasonable doubt was therefore obvious.

The error also affected Appellant's substantial rights. As the Utah Supreme Court and this Court have repeatedly stated, the failure to accurately instruct the jury on the elements of the crime "is reversible error as a matter of law." Jones, 823 P.2d at 1061; Laine, 618 P.2d at 35; Gibson, 908 P.2d at 354. In fact, failure to accurately instruct the jury on the elements "is reversible error that can never be considered harmless." State v. Souza, 846 P.2d 1313, 1320 (Utah Ct. App. 1993) (citing Jones, 823 P.2d at 1061). Thus, the error in this case requires reversal.

Although several recent cases appear on the surface to contest this conclusion, they have no application here. In State v. Stevenson, 884 P.2d 1287, 1292 (Utah Ct. App. 1994), this Court held that the failure to instruct the jury on the element of non-marriage in a rape case did not require reversal. Because the non-marriage element was never at issue at trial and "all testimony at trial clearly and indisputably established that defendant and [the victim] were not married," this Court held that manifest injustice did not occur in failing to instruct the jury on that element. Id. Stevenson presented a unique circumstance where not only was the evidence that the defendant and victim were not married clear and indisputable, but the non-marriage element had been deleted from the statute and no longer was included as an element of the crime when this Court reviewed Stevenson's conviction. Id. Given these unique circumstances, this Court upheld the conviction.

Following Stevenson, in Carr, this Court reiterated the rule that failure to give an accurate elements instruction requires reversal as a matter of law. Carr, 970 P.2d at 720. In Carr, the trial judge failed to instruct the jury that one of the elements of lewdness was the intent to derive sexual gratification. Id. Because the instruction did not include this element, this Court reversed the conviction as a matter of law without conducting a review for prejudice. Id.

Stevenson does not control nor does it provide a basis for departing from Utah Supreme Court holdings. The Utah Supreme Court has repeatedly held that failure to accurately instruct on the elements of a crime is manifest error requiring reversal as a matter of law. Moreover, this Court has reiterated that position after issuing Stevenson. Even if Stevenson did control, it would not apply in this case where the evidence regarding the missing element was not clear and indisputable, and instead, was controverted.

The Utah Supreme Court's opinions in State v. Kohl, 2000 UT 35, 999 P.2d 7 and State v. Veteto, 2000 UT 63, 401 Utah Adv. Rep. 10, do not alter this conclusion. First, those cases did not involve a review for manifest injustice in failing to instruct a jury on the elements. Instead, they analyzed whether the trial court erred in enhancing sentences for crimes involving more than two people, and if so, whether that error required reversal. Kohl, 2000 UT 35 at ¶¶ 26-31; Veteto, 2000 UT 62 at ¶¶ 10-12. Because the Court was not reviewing for manifest injustice, the Court never even contemplated overruling the Laine line of cases which require reversal as a matter of law when the jury is not instructed on an element.

Moreover, as the Utah Supreme Court recently ruled, Kohl and Veteto are limited to their unique facts in which "two co-defendants were found guilty in the same trial of identical charges by the jury that convicted the defendant." State v. Helmick, 2000 UT 70 ¶ 16, 402 Utah Adv. Rep. 27. In other words, reversal was not required because the jury had actually made the necessary finding allowing the trial court to impose the gang enhancement as a matter of law. Given the unique circumstances in Kohl and Veteto and the Court's failure to address Laine and other controlling case law, those cases do not overrule the Laine line of cases.

In the present case, the unique circumstances of Kohl and Veteto are not present. Since the jury was not instructed that aiding and abetting is an element of the crime, let alone given a definition of aiding and abetting, the jury did not find that Mr. Drake aided and abetted Ms. Tousley. And, contrary to the group enhancement, Mr. Drake's alleged aiding and abetting was squarely at issue. Although Ms. Tousley claimed that Mr. Drake devised the scheme to defraud, she totally lacked credibility given her repeated contradictory statements and perjurious testimony. Her trial testimony provided no basis for concluding that the jury correctly found that Mr. Drake aided and abetted. The State presented no other evidence showing that Mr. Drake participated in or had knowledge of Ms. Tousley's actions.

The United States Supreme Court decision in Neder v. United States, 119 S. Ct. 1827 (1999), similarly does not apply. In Neder, the Court applied harmless error analysis to a trial judge's failure to instruct the jury on an element of the crime. 119 S. Ct. at 1837. That holding does not apply to Utah appellate courts because they are "not required to apply federal standards of review when presented with challenges to trial court determinations made under federal law." State v. Thurman, 846 P.2d 1256, 1265 (Utah 1993). Indeed, this Court is required to follow the mandate of the Utah Supreme Court and conclude that the failure to accurately instruct a jury on all of the elements of a crime requires reversal as a matter of law. See Jones, 823 P.2d at 1061; Laine, 618 P.2d at 35; see also, Harmon, 712 P.2d at 292 (Utah Supreme Court refuses state's request that it conduct a harmless error review where trial court failed to instruct the jury on the basic elements of the crime).

Regardless of federal law, the error below involves a violation not only of federal due process, but also of state due process and Article I, section 10 of the Utah Constitution. See Lopes, 1999 UT 24 ¶ 13, 14; Saunders, 1999 UT 59 ¶ 60. Utah is, thus, free to continue finding that such violations of the state constitution require reversal as a matter of law.

Even if this Court were to conduct a harmless error review, the conviction in this case must be overturned because the error was not harmless beyond a reasonable doubt. In reviewing a constitutional violation for harmlessness, this Court must determine whether the error was "'harmless beyond a reasonable doubt.'" State v. Genovesi, 909 P.2d 916, 922 (Utah Ct. App. 1995) (quoting Scott v. State, 465 P.2d 620, 622 (Nev. 1970)). This standard required the State to show that the missing aiding and abetting element was "supported by uncontroverted evidence." Neder, 119 S.Ct. at 1838.

When determining whether an error in instructing on the elements was harmless beyond a reasonable doubt, the reviewing court does not "'become in effect a second jury to determine whether the defendant is guilty.'" Id. at 1839 (quoting R. Traynor, The Riddle of Harmless Error 50 (1970)). Nor does the reviewing Court conduct a sufficiency of the evidence review. Instead, the reviewing court considers whether the evidence on the missing element is controverted, i.e., "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." Id. at 1839; see also, Saunders, 1999 UT 59, ¶ 65 (holding that violation of juror unanimity requirement demand new trial where jurors could have made different findings from the controverted evidence).

Given Ms. Tousley's repeated lies, the evidence as to whether Mr. Drake solicited, requested, commanded, or intentionally aided Ms. Tousley was controverted. The only evidence supporting the State's theory that Mr. Drake solicited Ms. Tousley to commit the crimes came from Ms. Tousley herself, but she lacked any credibility whatsoever. She invented a story about loaning her ATM card and personal identification number when she spoke with America First's director of security, she concealed from police the fact that she retained $500 as payment for depositing the forged check, and she perpetuated this lie even though she was under oath at the preliminary hearing. She lied further when she claimed to have withdrawn the money in two transactions when bank records showed she withdrew the money at once.

Ms. Tousley continued her lies at trial when she denied printing on the back of the check "payed to the order of" in addition to her name even though the handwriting appears to be the same. Moreover, contrary to her testimony, it appears that different persons printed her name and then endorsed the check. Exhibit 1. Further, bank records establish that she deposited the second check on April 30, 1998, rather than April 29, 1998, which she represented at trial.

In addition to these fabrications, at trial, Ms. Tousley contradicted her statement to the police that she had worked with Mr. Drake at Taco Bell. She also gave conflicting stories about whether Mr. Drake and his friend accompanied her to withdraw the money or whether Mr. Drake met her at America First. Likewise, contrary to the preliminary hearing testimony, Ms. Tousley claimed at trial that she did not print the phrase "payed to the order of" on the back of the first check.

The failure to instruct the jury on aiding and abetting can hardly be considered harmless given these lies and conflicting stories. As the sole source of Mr. Drake's purported aiding and abetting, Ms. Tousley lacked credibility and reliability. This case epitomizes controverted evidence. Mr. Drake's convictions cannot withstand such scrutiny.

## II. AT TRIAL, MR. DRAKE DID NOT RECEIVE THE ASSISTANCE OF COUNSEL CONSTITUTIONALLY GUARANTEED BY THE SIXTH AMENDMENT.

The Sixth Amendment to the United States Constitution and Utah Constitution Article 1, section 12 guarantee a criminal defendant the right to effective assistance of counsel in defending all claims asserted against him in a court of law. There is a two-prong test used to determine whether someone has been rendered ineffective assistance of counsel at trial. See Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984), State v. Templin, 805 P.2d 182, 186 (Utah 1990). "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Alvarez v. Galetka, 933 P.2d 987 (Utah 1997).

### A. Trial Counsel Was Ineffective When He Waived Objection to the Faulty Jury Instructions.

The two alleged errors of trial counsel in this case meet the two-prong test found in Strickland and used by this Court. Proper jury instructions are an essential element of a fair trial guaranteed by both the federal and state constitutions. Failure to preserve the issue of the propriety of the instructions is not a tactical decision, but rather it is negligent of the necessity of jury instructions that include all elements of the charged offense. Further, trial counsel's failure to object to the incomplete jury instructions constituted manifest injustice. Manifest injustice occurs where the trial judge fails to accurately instruct the jury on all of the elements of a charged offense. State v. Jones, 823 P.2d 1059 (Utah 1991).

If the jury had been fully instructed on the elements of the crime, they would have been required to find the Defendant guilty of the aiding and abetting element. The jury must have found beyond a reasonable doubt that the Defendant solicited, requested, commanded, encouraged, or intentionally aided the principal actor to perpetuate the fraud.

The State failed to establish that the Defendant was guilty of the aforementioned aiding and abetting. By denying the jury the opportunity to consider this element, the Defendant was prejudiced. The inclusion of this element in the instructions for the jury's consideration would have resulted in a different outcome as there was no evidence that actually supported the finding of guilt as a principal actor. Trial counsel's waiver of objection to the jury instructions was clearly in error and resulted in a denial of the Defendant's right to a fair trial.

### B. Trial Counsel Failed to Fully Investigate and Obtain Witnesses to Testify on Behalf of Mr. Drake.

Trial counsel also erred by failing to investigate potential witnesses to testify for the Defendant at trial. The Defendant was aware of the identity of the actual perpetrator of the fraud. See Addendum M, affidavit of Brian William Drake. The Defendant provided counsel with this information, but counsel failed to investigate or inquire further regarding the potential witness. The information given to counsel by Mr. Drake regarding the other witness was exculpatory evidence and counsel's failure to investigate this prejudiced Defendant. In State v. Templin. 805 P.2d 182, 188 (Utah 1990), the Utah Supreme Court found:

> If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the 'wide range of reasonable professional assistance.' This is because a decision not to investigate cannot be considered a tactical decision. It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons."

Quoting Strickland v. Washington, 466 U.S. at 686.

The Defendant's trial counsel failed to investigate possible defense witnesses to testify at trial even after the Defendant provided him with the name of the man he believed to be responsible for the alleged fraud. This failure of counsel to fully investigate all of the facts denied the Defendant effective assistance of counsel and Mr. Drake was prejudiced as a result. There is a reasonable probability that had the witness been called to testify, the outcome at trial would have been different, thus satisfying the two-prong Strickland ineffective assistance of counsel analysis.

## III. GIVEN MS. TOUSLEY'S TOTAL LACK OF CREDIBILITY AND MR. DRAKE'S TENUOUS CONNECTION TO THE CRIMES, THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. DRAKE OF THE CHARGES.

Irrespective of the faulty jury instructions, the State failed to present sufficient evidence to convict Mr. Drake. This Court must reverse a conviction for lack of evidence when the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime. State v. Giles, 966 P.2d 872, 876 (Utah Ct. App. 1998). This appeal involves just such a case, given Ms. Tousley's lack of credibility and the absence of evidence even hinting that Mr. Drake participated in the crimes.

The undisputed marshaled evidence reveals the following:

1. Ms. Westlake lived at 149 South 700 East for seven years until August of 1997. R. 150: 107

2. Although Ms. Westlake had closed her account with Providian prior to April 28, 1998, Providian continued to send her $3,000 cash advance checks that, if cashed would reopen her account. R. 150: 109.

3. Ms. Westlake received her mail through a slot in her front door. R. 150: 108.

4. Ms. Westlake did not know Mr. Drake or Ms. Tousley and she did not authorize either of them to sign her name on her behalf. R. 150: 112, 94-95.

5. Mr. Drake was living in Ms. Westlake's former apartment on April 28, 1998, to May 1, 1998. R. 150: 112-13.

6. On April 28, 1998, Ms. Tousley endorsed a Providian check for $3,000 that was payable to Ms. Westlake and then deposited into her bank account. The check was dated March 27, 1998. R. 150: 70-71.

7. The same person appears to have printed on the back of the check "payed to the order of Cathi Tousley." Some unidentified person forged Ms. Westlake's signature. R. 150: 81-82.

8. On April 19, 1998, Ms. Tousley withdrew $2,500 from her bank account. Exhibit 3.

9. On April 30, 1998, she deposited another Providian check made out to Ms. Westlake in the amount of $3,000. That check was dated April 27, 1998. R. 150: 93-94.

10. When an America First security investigator confronted Ms. Tousley about these incidents, she claimed to have loaned her ATM card and personal identification

number to some friends. She claimed she did not know what they had done with the card. R. *150: 104-05.*

At trial, Ms. Tousley presented the following information for the first time:

1. Mr. Drake asked her to deposit the checks into her bank account because Ms. Westlake owed him money and he did not have an account in Utah. R. 150: 68-70

2. As payment for Ms. Tousley's help, Mr. Drake offered to let her keep $500 of each of the $3,000 transactions. R. 150: 70.

3. The day after depositing the first check, Ms. Tousley met Mr. Drake at an American First branch where Ms. Tousley withdrew $2,500 and gave it to Mr. Drake. R. 150: 72.

4. Ms. Tousley claimed that when she informed Mr. Drake that America First had placed a hold on the second check, he became angry, threatened her, and left messages on her answering machine. R. 150: 150: 75, 87-88.

It is further argued that Ms. Tousley offered the following false statements and perjurious testimony:

1. She informed the police that she had worked with Mr. Drake at Taco Bell, but denied at trial ever working with or seeing him there. R. 150: 67-68, 85.

2. She initially told the police that Mr. Drake and a friend of his had accompanied her to deposit the first check but maintained at trial that she met Mr. Drake at an America First branch. R. 150: 72.

3. At trial, Ms. Tousley denied ever telling the police that Mr. Drake had driven her to the bank to withdraw the money. R. 150: 88.

4. At her trial, Ms. Tousley retracted her preliminary hearing testimony in which she asserted that she had written on the back of the first check "payed to the order of." R. 150: 70-71, 79.

5. Although a casual inspection of the first check reveals that the same person who wrote "payed to the order of" appears to have printed Ms. Tousley's name, Ms. Tousley claimed at trial that she only printed her name. Exhibit 1.

6. Contrary to Ms. Tousley's story, different persons appear to have printed her name and then endorsed the check.

7. She lied to the police and under oath at the preliminary hearing when she claimed to have withdrawn the entire $3,000 in two separate transactions and then given it to Mr. Drake.

8. Bank records refute Ms. Tousley's trial testimony that she deposited the second check on April 29, 1998. She actually deposited that check on April 30, 1998. Exhibit 3.

Because Ms. Tousley's allegations alone link Mr. Drake to the crimes, the sufficiency of the evidence hinges on her credibility. Given Ms. Tousley's chronic lies, her testimony lacks any weight and cannot be trusted. She lied to the bank security officer about loaning her ATM card and Personal identification number to someone. When the police confronted her, she blamed Mr. Drake and invented a story about working with him and traveling to America First with him and a friend to withdraw all of the money in two separate transactions. She reasserted these lies under oath at the preliminary hearing.

Ms. Tousley purported to reveal her true involvement in the scheme only when confronted by the police and prosecutors just before trial. When presumably shown her bank records which demonstrated that she kept $500 for herself, she realized that she had to explain why she had not revealed the payment previously. Only after placing herself in this precarious situation did she allege, for the first time, that Mr. Drake had threatened her.

Her lies continued at trial. Although bank records indisputably established that she withdrew $2,500 on April 30, 1998, she testified that she recorded this transaction on April 29. Even more disturbing, Ms. Tousley admitted to lying at the preliminary hearing and claimed that she had only printed her name and had not written "payed to the order of" even though the same person appears to have written that phrase and her name. The check reveals further that Ms. Tousley lied when she claimed that she both printed her name and endorsed the check. In essence, at each stage of the proceedings, Ms. Tousley fabricated and embellished the facts as it suited her needs. Reasonable persons could not have believed her testimony.

The State presented no other evidence linking Mr. Drake to the crimes. Since the State could not show who forged Ms. Westlake's signature, the evidence did not support the forgery conviction under a principal theory. Further, the State produced no bank records or other documents indicating that Mr. Drake actually received the $2,500. No other person implicated Mr. Drake in the crimes. The State's case solely stemmed from a known liar's accusations.

The only possible evidence that even hints to Mr. Drake's participation was the fact that he was residing in Ms. Westlake's former residence from April 28 to May 1, 1998. That evidence fails to implicate him in the crimes at all. Mr. Drake was charged and convicted for the forgery and theft relating only to the check dated March 27, 1998. The State presented no evidence concerning who lived at Ms. Westlake's former residence between the date of the check and April 28, 1998.

This time gap prevented the jury from connecting Mr. Drake to the crimes. In State v. Kalisz, 735 P.2d 60, 61 (Utah 1987), the Utah Supreme Court found a much narrower gap insufficient to show a defendant's guilt. The defendant in that case dropped off a friend at a used car lot. The friend then pretended to "test drive" a used car for several hours, but actually used it to rob a store. Kalisz returned the car to the used car dealer within minutes after the robbery. He also lied to the police about taking his friend to the hospital for an appendicitis attack. The Utah Supreme Court ruled that the State's failure to place Kalisz at the robbery or to connect him to any stolen goods was insufficient to prove his involvement in the robbery or that "he had the requisite mental state." Id.

This case presents an even stronger case for insufficient evidence. A month separated the mailing of the first check and its deposit and Mr. Drake's residency at the apartment. Like in Kalisz, the State presented no evidence linking Mr. Drake to the $2,500 that Ms. Tousley withdrew from her account. Additionally, the State could not show who forged Ms. Westlake's signature. These gaps prevented the State from establishing that Mr. Drake participated in the forgery or that he had any intent to participate.

Admittedly, the second check was apparently mailed during Mr. Drake's residency at Ms. Westlake's former apartment. But, the State did not charge Mr. Drake with any crimes connected with that check. At any rate, possession of the second check fails to prove either that Mr. Drake possessed the first one, gave it to Ms. Tousley, or asked her to deposit it. Likewise, the State did not show who lived in the apartment when the first check was delivered or if other people had access to the apartment while Mr. Drake lived there. Other than Ms. Tousley's incredible testimony, the State presented no evidence showing how she possessed the first check or that Mr. Drake ever handled it. The delivery of the second check simply fails to resolve the critical issues necessary to showing that Mr. Drake gave the first check to Ms. Tousley and asked her to deposit it.

## CONCLUSION

Appellant Brian William Drake requests this Court to reverse his convictions for lack of evidence or to reverse and remand for a new trial because the trial judge failed to properly instruct the jury.

DATED this 27 day of February, 2001

STEPHANIE AMES
Attorney for Defendant/Appellant

# CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of the Appellant, together with its Addenda, were mailed, postage prepaid, to:

J. Frederic Voros, Jr.
Assistant Attorney General
160 East 300 South, 6th Floor
PO Box 140854
Salt Lake City, Utah 84114-0854

DATED this 27 day of February, 2001.

H. Yocom

# ADDENDA

# ADDENDUM A

IMAGED

FILED DISTRICT COURT
Third Judicial District

MAR 3 2000

SALT LAKE COUNTY
By ____ Deputy Clerk

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH,
Plaintiff,

vs.

BRIAN WILLIAM DRAKE,
Defendant.

MINUTES
SENTENCE, JUDGMENT, COMMITMENT
NOTICE

Case No: 991902669 FS

Judge: LESLIE A. LEWIS
Date: March 3, 2000

---

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 03-7-00

PRESENT
Clerk: chells
Prosecutor: VINCE MEISTER
Defendant
Defendant's Attorney(s): JEFFREY W. HALL

DEFENDANT INFORMATION
Date of birth: April 15, 1973
Video
Tape Number: 12:10 pm

CHARGES

1. FORGERY - 3rd Degree Felony
   Plea: Guilty - Disposition: 11/15/1999 Guilty Plea
2. THEFT BY DECEPTION - 3rd Degree Felony
   Plea: Guilty - Disposition: 11/15/1999 Guilty Plea

*SENTENCE PRISON*

Based on the defendant's conviction of FORGERY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of THEFT BY DECEPTION a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Criminal Sentence, Judgment Commitment
991902669 JD1165932 DRAKE BRIAN WIL JD

122

Case No: 991902669
Date: Mar 03, 2000

---

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Count 1 and 2 are to run consecutive to each other.

Total Fine: $500.00
Total Suspended: $0
Total Surcharge: $425.00
Total Principal Due: $925.00
Plus Interest

SENTENCE TRUST

The defendant is to pay the following:
Restitution: Amount: $2917.50 Plus Interest
Pay in behalf of: ATTN BETH CAMPBELL AMERICA FIRST

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant is to pay a fine of 925.00 where the surcharge has been added to the fine. Interest may increase the final amount due.
Pay fine to The Court.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Submit to searches of person and property upon the request of any Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.
Submit to tests of breath and urine upon the request of any Law

---

Enforcement Officer.
Violate no laws.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Serve 10 days in jail with credit for 10 days served.
Enter into and complete the out patient Odyssey House program.
Show proof to the court have been accepted within 30 days of today.
Leave in approved housing by APPD.
No contact with co-defendant Catherine Tousley.
Pay restitution jointly and severally with co-defendant in the amount of $2917.05 to America First.
Monthly payments in the amount of $150.00 towards restitution.
Full time work within 30 days

REVIEW HEARING is scheduled.
Date: 05/26/2000
Time: 08:30 a.m.
Location: Fourth Floor - N44
THIRD DISTRICT COURT
450 SOUTH STATE
SLC, UT 84111-1860
Before Judge: LESLIE A. LEWIS

Dated this 3rd day of March, 2000.

Leslie A Lewis
LESLIE A. LEWIS
District Court Judge

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7300 at least three working days prior to the proceeding. The general information phone number is (801) 238-7300.

# ADDENDUM B

FILED DISTRICT COURT
Third Judicial District

NOV 15 [illegible]

SALT LAKE COUNTY
By ______________ Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT**

**IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

---

| | | |
|---|---|---|
| **THE STATE OF UTAH,** | : | |
| **Plaintiff,** | : | **INSTRUCTIONS TO THE JURY** |
| **vs.** | : | **CRIMINAL NO. 991902669** |
| **BRIAN WILLIAM DRAKE,** | : | |
| **Defendant .** | : | |

---

## INSTRUCTION NO. 1

You are instructed that the defendant BRIAN WILLIAM DRAKE is charged by the Information which has been duly filed with the commission of FORGERY and THEFT BY DECEPTION. The Information alleges:

FORGERY, a Third Degree Felony, at 3190 South Richmond Street, in Salt Lake County, State of Utah, on or about April 28, 1998, in violation of Title 76, Chapter 6, Section 501, Utah Code Annotated 1953, as amended, in that the defendant, BRIAN WILLIAM DRAKE, a party to the offense, did alter, make, complete, execute, authenticate, issue, transfer, publish, or utter any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purported to be the act of another, with a purpose to defraud.

THEFT BY DECEPTION, a Third Degree Felony, at 3190 South Richmond Street, in Salt Lake County, State of Utah, on or about April 28, 1998, in violation of Title 76, Chapter 6, Section 405, Utah Code Annotated 1953, as amended, in that the defendant, BRIAN WILLIAM DRAKE, a party to the offense, obtained or exercised control over the property of America First Credit Union by deception, with the purpose to deprive the owner thereof, and that the value of said property is or exceeds $1,000, but is less than $5,000.

# ADDENDUM C

# INSTRUCTION NO. 3

You are instructed that to the Information the defendant has entered a plea of not guilty. The plea of not guilty denies each of the essential allegations of the charges contained in the Information and casts upon the State the burden of proving each to your satisfaction and beyond a reasonable doubt.

# ADDENDUM D

INSTRUCTION NO. 12

Every person, acting with the mental state required for the commission of the offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

# ADDENDUM E

INSTRUCTION NO. ______

Before you can convict the defendant, BRIAN WILLIAM DRAKE, of the offense of Forgery as charged in count I of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 28th day of April, 1998, in Salt Lake County, State of Utah, the defendant, BRIAN WILLIAM DRAKE, intentionally or knowingly made, executed, issued or uttered a writing; and

2. That said writing or utterance purported to be the act of Patricia R. Westlake; and

3. That said writing or utterance was not the act of Patricia R. Westlake; and

4. That said writing or utterance was not authorized by Patricia R. Westlake; and

5. That the said defendant then and there knew the writing was not the act of Patricia R. Westlake and was not authorized by Patricia R. Westlake; and

6. That the said defendant then and there had a purpose to defraud.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Forgery as charged in count I of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count I.

# ADDENDUM F

## INSTRUCTION NO. [illegible]

Before you can convict the defendant, BRIAN WILLIAM DRAKE, of the offense of Theft by Deception as charged in count II of the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 28th day of April, 1998, in Salt Lake County, State of Utah, the defendant, BRIAN WILLIAM DRAKE, intentionally or knowingly obtained or exercised control over the property of America First Credit Union; and
2. That the defendant obtained or exercised control over such property by deception; and
3. That the defendant obtained or exercised control over such property with a purpose to deprive the owner thereof; and
4. That the value of the property was or exceeded $1,000.00 but was less than $5,000.00.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Theft by Deception as charged in count II of the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of count II.

# ADDENDUM G

## 76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

# ADDENDUM H

## 76-6-501. Forgery — "Writing" defined.

(1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

(a) alters any writing of another without his authority or utters any such altered writing; or

(b) makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section, "writing" includes printing, electronic storage or transmission, or any other method of recording valuable information including forms such as:

(a) checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification;

(b) a security, revenue stamp, or any other instrument or writing issued by a government or any agency; or

(c) a check, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

(3) Forgery is a felony of the third degree.

# ADDENDUM I

## 76-6-405. Theft by deception.

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

(2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

# ADDENDUM J

## Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

# ADDENDUM K

## AMENDMENT V

### [Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# ADDENDUM L

# AMENDMENT XIV

## Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

## Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

## Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

## Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

# ADDENDUM M

Stephanie Ames (#6466)
**GUSTIN, CHRISTIAN, SKORDAS,**
**& CASTON, L.L.C.**
Suite 810 Boston Building
9 Exchange Place
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Attorney for Defendant

# In the Utah Court of Appeals

| | |
|---|---|
| THE STATE OF UTAH,<br>Plaintiff/Appellee<br>v.<br>BRIAN WILLIAM DRAKE<br>Defendant/Defendant | **AFFIDAVIT OF BRIAN WILLIAM DRAKE**<br>Case No. 20000298-CA |

I, Brian William Drake, being first duly sworn, depose and say as follows:

1. I am the Defendant in the above-mentioned case.

2. I provided trial counsel, Jeffrey Hall, with information regarding the actual perpetrator of the fraud I was charged with.

3. Mr. Hall failed to further inquire about the information I provided him with regarding the involvement of another person.

4. Mr. Hall failed to investigate the possibility that someone other than myself was responsible for the alleged acts.

5. I gave Mr. Hall the name and address for a witness who would assist in the defense of my case. The name and current information for that witness is Aaron Wahe, 603 Cornwall Way, Fruitland, ID 83619.

Further, Affiant sayeth not.

DATED this 19 day of December, 2000.

Brian W Drake

Brian William Drake

Subscribed and sworn before me on this 19 day of December, 2000.

Kristine Wimmer Berg

Notary Public
My Commission Expires
Residing at:

Notary Public
KRISTINE WIMMER BERG
9 Exchange Place, Ste. 810
Salt Lake City, Utah 84111
My Commission Expires
June 17, 2004
State of Utah

EXHIBIT 1

**rovidian National Bank**

54-197/114

5 Main Street
lton, New Hampshire 03276

March 27, 1998

**AY** **Three Thousand Dollars and No Cents** **$3,000.00**

Void after 45 days
Not valid for more than $5,000
Must be endorsed by payee

**PAY TO THE ORDER OF**
Patricia R Westlake
149 S 700 E
Salt Lake City UT 84102-1111

030188457 02 4933 4616

Eileen Stack

05000 011401973 123207 12538 6129 0000300000

149 S. 700 E. #B.

84102

Former Address.
mail went there.

to my credit account subject

Payed to the order of
Cathe Tousley

Patricia Rukstake

Must be endorsed by payee.

Cathi Tousley

**20 42**
**For Deposit Only**
**A.F.C.U.**

0003 07954

AMERICA FIRST
CREDIT UNION
OGDEN UTAH
3243775164

3243
77516

APR 29 98

FRB BOSTON
0110-000
AP 30 98
05-01-9
PROVIDIAN NATIONAL BANK CONCORD NH

EXHIBIT 3

AMERICA FIRST
CREDIT UNION

```
IR SYSTEM                AMERICA FIRST CREDIT UNION
7/10/98                      SUBLEDGER INQUIRY                             13:06:54

CCT - 490900-8    CATHERINE B~TOUSLEY LOW DATE -  4/01/98 HIGH DATE -  5/01/98
                                         START      -          PAGE        - 01
EFF    LOG   BRTR CODE FOLIO SDESC SC    AMOUNT    INTEREST PRINCIPAL    BALANCE
---- ----- ---- ---- ----- ----- -- ---------- -------- ---------- ----------
                        ***** SHARE SUB-ACCOUNT 1 *****                   25.71
3098         2041 SFTV ATM41 SFX9         110.00                          135.71
0198 43098 00    D TV 03790                  .09                          135.80
                        ***** SHARE SUB-ACCOUNT 9 *****                  613.45
0698         3019 SDCR  2751               67.19                          680.64
0698         3019 SWCD  2796             -643.75                           36.89
0698         3019 SWCD  2871              -30.00                            6.89
0698         1647 SDCR  5476               81.08                           87.97
0798         2060 SWCD ATMPL              -21.50                           66.47
     040798924031UT SALT LAKE, 405 SOUTH MAIN ST
0798         2060 STTV ATMPL FEENT         -1.00                           65.47
0798         3015 SWCD  5968              -30.00                           35.47
.098         3023 SDCR  1934               54.32                           89.79
1198         2060 SWCD ATMPL              -61.50                           28.29
     041298146051UT SALT LAKE, 828 S. 920 W.
1198         2060 STTV ATMPL FEENT         -1.00                           27.29
1598         2042 SWCD ATM42        S     -20.00                            7.29
1798         1605 SDCR  7426               33.71                           41.00
.898 42098 2041 SWCD ATM41        S     -40.00                            1.00
2898         3005 SDCR  5428               37.08                           38.08
2898         1633 SWCD  7792              -20.00                           18.08
2898         2042 SDCR ATM42            3,000.00                        3,018.08
2998         3019 SWCD C1003              -81.29                        2,936.79
2998         1619 SWCD  9516           -2,500.00                          436.79
3098         2060 SWCD ATMPL             -301.50                          135.29
     043098219111UT SALT LAKE, 1953 W CALIFORNIA
3098         2060 STTV ATMPL FEENT         -1.00                          134.29
3098         2007 SDCR ATM07            3,000.00                        3,134.29
3098         2041 STTV ATM41 SFX1        -110.00                        3,024.29

UNCTION          TASK
                                     ( AISUBLED - 11/18/97 - 13:23:00 )
                                     (01/SECR/BETH CAMPBELL             )
```